

WHEN ALL OF US ARE VICTIMS: JUROR PREJUDICE AND “TERRORIST” TRIALS

NEIL VIDMAR*

INTRODUCTION

September 11, 2001 marked the beginning of an era in which Americans became acutely aware that organized groups of persons not only oppose United States hegemony in political, military, and cultural spheres, but are prepared to engage in acts of terrorism on our home soil as well as places overseas. Some of these terrorists are likely to be American citizens, legal residents, or visitors living within the United States. The acts of terrorism are related to religion. Perpetrators are members of the Muslim faith or linked in some way to that faith. Many are of Middle Eastern ethnic descent. The President, the U.S. Attorney General, and many other public leaders have emphasized the threat of terrorism at home and abroad, now and for the indefinite future.¹ Congress passed the USA Patriot Act that allows a broad range of infringements on civil liberties² and, in actual implementation, the identification and special treatment of males from Middle Eastern countries.³ Moreover, public leaders have informed us that the terrorists are not just those associated with al-Qaeda, the organization responsible for the tragedies of September 11, but rather include members of other organizations that, although

* Russell M. Robinson II Professor of Law, Duke Law School. The author is indebted to Professors Valerie Hans and Mary Rose for comments on an earlier draft of this Article. I am also indebted to Professor Edward Bronson whose comments and advice have shaped a number of ideas in this Article. The data were gathered when the present author served as an independent consultant to the legal team defending John Walker Lindh and not in his capacity as a Duke University employee. Writing of the Article was supported, in part, by Duke Law School, but the opinions offered in the Article do not necessarily reflect the opinions of that institution.

1. A bibliography bearing on the threats and warnings is available at <http://odl.state.ok.us/usinfo/terrorism/911.htm>.

2. H.R. Res. 3162, 107th Cong., 147 CONG. REC. H7159 (daily ed. Oct. 24, 2001) (enacted). For the language of the bill, see 146 CONG. REC. H7159 (daily ed. Oct. 23, 2001).

3. See generally Phillip O'Connor, *Monday Was INS Registration Deadline; Visitors from 5 Muslim Nations Had to Report; About 140 Men in Area Are Affected*, ST. LOUIS POST DISPATCH, Dec. 17, 2002, at C1.

possibly independent of al-Qaeda, have common goals and loose links with that organization.⁴

Subsequent to September 11, the list of alleged terrorists or persons alleged to have assisted terrorists includes, but is not limited to, John Walker Lindh, the so-called "American Taliban,"⁵ and Zacarias Moussaoui, who is facing trial on charges of conspiring to aid the September 11 hijackers.⁶ Enaam Arnaout, the head of a Muslim charity, was accused of funneling money to al-Qaeda.⁷ Mousa Marzook, his wife, and five of his brothers were indicted on charges of laundering money and sending computers to Libya and Syria.⁸ The "Lackawana Six" were indicted on charges of supporting a foreign terrorist organization outside of Buffalo, New York.⁹ Two brothers of Lebanese descent were charged with aiding Hezbollah, although neither was charged with participating in any terrorist attack or having any connection to the September 11 attacks.¹⁰ Four Detroit men of Arab descent were indicted on charges of providing material support or resources to terrorists and conspiracy to engage in fraud.¹¹ Sami Al-Arian, a professor at Florida International University, has been indicted in Florida on charges of being the U.S. leader of the Palestinian Islamic Jihad.¹² Twelve people associated with a Seattle business were indicted for illegally wiring at least \$12 million in money and goods to Iraq.¹³ In March 2003, federal agents arrested

4. See, e.g., U.S. DEP'T OF STATE, Arrest of Al Qaeda Leader Seen As Blow to Global Terrorist Network, at <http://isinfo.state.gov/topical/pol/terror.03030404.htm>; Eric Lichtblau, *Critics: '96 Law vs. Terror is Abused*, RALEIGH NEWS & OBSERVER, Apr. 6, 2003, at 10A.

5. E.g., Timothy Roche, *A Short Course in Miracles*, TIME, July 29, 2002, at 32; Timothy Roche et al., *The Making of John Walker Lindh: How Did a Quiet, Bright Young Boy from Suburban American End Up Alongside the Taliban in Afghanistan?*, TIME, Oct. 7, 2002, at 44.

6. United States v. Moussaoui, (E.D. Va. No. 01-455-A), available at [http://notable-cases.vaed.uscourts.gov/1:01-cr-00455/docket Sheet.html](http://notable-cases.vaed.uscourts.gov/1:01-cr-00455/docket%20Sheet.html).

7. Mike Robinson, *Muslim Charity Leader Pleads Guilty*, RALEIGH NEWS & OBSERVER, Feb. 11, 2003, at 5A.

8. Angela K. Brown, *Suspected Hamas Leader Arrested*, RALEIGH NEWS & OBSERVER, Dec. 19, 2002, at 6A.

9. United States v. Goba et al., No. 02-CR-214S (W.D.N.Y. Jan. 2003), available at <http://nywd.uscourts.gov>.

10. Gary L. Wright, *Brothers Found Guilty of Plotting to Aid Terrorists; Prosecutors Accused 2 Lebanese Men of Being Part of Local Support Cell for Hezbollah; Landmark Trial Could Open Door to Battling Financial Networks Through Prosecutions*, CHARLOTTE OBSERVER, June 21, 2002, at 1A.

11. Allan Lengel, *Skepticism of Detroit Arab Americans Grows; Some Doubt Charges Against 4 Accused of Operating Terror Cell*, WASH. POST, Sept. 15, 2002, at A3.

12. Jess Bravin & Glenn R. Simpson, *Confronting Iraq and Terror: Florida Professor, 7 Others Are Accused of Terror Funding*, WALL ST. J., Feb. 21, 2003, at A8.

13. *12 Charged With Wiring Funds to Iraq*, RALEIGH NEWS & OBSERVER, Dec. 20, 2002, at A3.

nine people across the country on charges that they were smuggling money abroad and selling false passports that could aid terrorists.¹⁴ A number of the defendants in these cases, including John Walker Lindh, have pleaded guilty to some of the charges laid against them,¹⁵ and others have been found guilty.¹⁶ Still others may have their trials shifted to a military tribunal.¹⁷

After one of the accused, Mr. Arnaout, entered a guilty plea to some of the charges his lawyer commented: "One has to question whether a fair and impartial jury could be found anywhere in America today that could sit in judgment of an Arab-American in a case involving allegations of terrorism."¹⁸ That assertion is central to the issues addressed in this Article. Can a person accused of being a terrorist or supporting terrorists receive a fair trial when every potential juror is also a victim? I use the term "victim" broadly, to refer not only to the potential of becoming the physical casualty of a terrorist incident, but also a victim of attacks on the values associated with U.S. nationality, often referred to in the popular press and common parlance as the "American way of life." What roles are adherence to the Muslim religion and being of ethnic-Arab descent likely to play in the prospects of obtaining a fair trial?

The Article discusses the issue of fair trial, and it addresses the adequacy of procedural safeguards as remedies for prejudice. Problems associated with procedural remedies are explored in the context of survey research undertaken for a change of venue motion in the trial of John Phillip Walker Lindh, the so-called "American Taliban."¹⁹

14. John Solomon, *9 Accused of Possible Schemes to Finance Terrorists*, RALEIGH NEWS & OBSERVER, Mar. 22, 2003, at 7A.

15. See, e.g., Mark Bryant, *Man Guilty of Backing bin Laden*, RALEIGH NEWS & OBSERVER, Apr. 15, 2003, at A3; *Second of 6 Alleged al-Qaeda Trainees Admits Guilt*, RALEIGH NEWS & OBSERVER, Mar. 25, 2003, at 6A.

16. Wright, *supra* note 10.

17. See Jerry Markon, *Court Seeks Deal on Terror Witness Access*, WASH. POST, Apr. 16, 2003, at A12.

18. Mike Robinson, *Muslim Charity Leader Pleads Guilty*, RALEIGH NEWS & OBSERVER, Feb. 11, 2003, at 5A.

19. Declaration of Neil Vidmar in Support of Defendant's Motion to Dismiss, or in the Alternative, for Change of Venue, *United States v. Lindh*, (E.D. Va. No. 02-37-A).

I. CASE LAW AND TRIAL PREJUDICE: A SOCIAL PSYCHOLOGICAL PERSPECTIVE

A. Case Law

Although many research findings yield the conclusion that, on balance, American juries perform their tasks very well,²⁰ the research findings must be viewed from the perspective that the juries' performance takes place in the context of judicially created remedies to ward against lay persons who may not be impartial in deciding the dispute before the court. These remedies include change of venue, temporary or permanent continuances of proceedings, voir dire permitting challenges for cause and peremptory challenges, and judicial admonitions to jurors about the need to be impartial.²¹

Cases that involve extensive pretrial publicity create especial problems. The leading cases of *Irwin v. Dowd*,²² *Rideau v. Louisiana*,²³ and *Sheppard v. Maxwell*²⁴ recognized that media coverage, or other factors that inflame a community, can create a presumption that strong prejudice exists and that a fair trial cannot be obtained in that community, setting forth grounds for a change of venue. In *United States v. McVeigh*, a case that involved domestic terrorism and resulted in a change of venue, Judge Matsch asserted:

Extensive publicity before trial does not, in itself, preclude fairness. In many respects media exposure presents problems not qualitatively different from that experienced in earlier times in small communities where gossip and jurors' personal acquaintances with lawyers, witnesses, and even the accused were not uncommon. Properly motivated and carefully instructed jurors can and have exercised the discipline to disregard that kind of prior awareness. Trust in their ability to do so diminishes when the prior exposure is such that it evokes strong emotional responses or such an identification with those directly affected by the conduct at issue that the jurors feel a personal stake in the outcome. That is also true when there is such identification with a community point of view that jurors feel a sense of obligation to reach a result which will find general acceptance in the relevant audience.²⁵

20. *E.g.*, VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986).

21. NANCY GERTNER & JUDITH MIZNER, THE LAW OF JURIES (1997).

22. 366 U.S. 717, 725-29 (1961).

23. 373 U.S. 723, 726-27 (1963).

24. 384 U.S. 333, 356-57 (1966).

25. *United States v. McVeigh*, 918 F. Supp. 1467, 1473 (W.D. Okla. 1996).

In contrast to the above-mentioned cases, *Patton v. Yount*²⁶ and *U.S. v. Pedraza*,²⁷ while taking cognizance of pretrial prejudice, concluded that voir dire screening was the appropriate remedy. In *Patton*, the Court took notice of a reduced level of media coverage during the pretrial stages, and concluded that time “soothes and erases” memory of a crime.²⁸ Although 77% of the *Patton* venire admitted they had an opinion about the case, all of the seated jurors assured the Court that they could put their opinions aside and decide the case solely on the evidence. A belief in juror assurances of impartiality appears very strong in both federal and state courts.²⁹ This assumption is questioned by Hans and Jehle³⁰ and by Rose³¹ in this issue of the *Chicago-Kent Law Review*. Further data bearing on the validity of the assumption will be addressed below.

B. The Social Psychology of Trial Prejudice

In reviewing *Patton*, the U.S. Supreme Court stated that jurors are not impartial if “they have such fixed opinions that they [can] not judge impartially the guilt of the defendant,”³² and in *United States v. McVeigh*, Judge Matsch asserted that “prejudice” involves an “adverse judgment or opinion formed beforehand or without knowledge or examination of the facts.”³³ Judge Matsch further stated that the existence of prejudice is not easy to prove, in part because “[i]t may go unrecognized in those who are affected by it”³⁴ and that it “has its most powerful effect if it generates strong emotional responses and fits into a pattern of normative values.”³⁵ Social science research on the psychology of juror decision making is consistent with the above

26. 467 U.S. 1025, 1034 (1984).

27. 25 F.3d 1051 (6th Cir. 1994).

28. *Patton*, 467 U.S. at 1034.

29. EDWARD BRONSON, THE EFFECTIVENESS OF VOIR DIRE IN DISCOVERING PREJUDICE IN HIGH PUBLICITY CASES: AN ARCHIVAL STUDY OF THE MINIMIZATION EFFECT (1989); Michael Jacob Whellan, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175 (1990); Gerald Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425 (1999).

30. Valerie P. Hans & Alayna Jehle, *Avoid Bald Men and People with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 CHI.-KENT L. REV. 1179 (2003).

31. Mary R. Rose, *A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding Peremptory Challenge*, 78 CHI.-KENT L. REV. 1061 (2003).

32. *Patton*, 467 U.S. at 1035.

33. *United States v. McVeigh*, 918 F. Supp. 1467, 1472 (W.D. Okla. 1996).

34. *Id.*

35. *Id.*

legal reasoning. Jurors do not approach the trial as empty receptacles who passively listen to the evidence and decide cases independently of their past experience, knowledge, and awareness of community norms. Numerous studies have shown that jurors do not simply store and record evidence; rather, they draw upon their prior understandings of the world as they evaluate and make sense of the evidence presented at trial.³⁶ They actively select and organize the trial evidence around pre-existing social schemas to construct "stories" about the events in dispute. They fill in gaps in the evidence with inferences about how the world works, and they arrange it in sequences of motivations involved in human actions. These processes include assumptions about important past events, circumstances in which events took place, inferences about human character, and the motivations of the parties involved.

Research indicates that events that cause strong negative emotions,³⁷ or that threaten people's cultural world view, affect the way that these schemas operate.³⁸ For example, respondents, who are reminded of their mortality compared to control persons, have been

36. See, e.g., Jonathon D. Casper et al., *Juror Decision Making, Attitudes and the Hindsight Bias*, 13 LAW & HUM. BEHAV. 291 (1989); James A. Holstein, *Juror's Interpretation and Jury Decision Making*, 9 LAW & HUM. BEHAV. 83 (1985); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991); Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY AND SOC. PSYCHOL. 189 (1982); Vicki L. Smith & Christina A. Studebaker, *What Do You Expect? The Influence of People's Prior Knowledge of Crime Categories on Fact Finding*, 20 LAW & HUM. BEHAV. 517 (1996); R. L. Wiener et al., *The Psychology of Telling Murder Stories: Do We Think in Scripts, Exemplars, or Prototypes?*, 20 BEHAV. SCI. & L. 119 (2002).

37. See, e.g., Vicki L. Fishfader et al., *Evidential and Extralegal Factors in Juror Decisions: Presentation Mode, Retention and Level of Emotionality*, 20 LAW & HUM. BEHAV. 565 (1996); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire In Criminal Cases With Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665 (1991); Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies and Jury Bias*, 14 LAW & HUM. BEHAV. 409 (1990); James R. P. Ogloff & Neil Vidmar, *The Impact Of Pretrial Publicity On Jurors: A Study To Compare The Effects Of Television And Print Media In A Child Sex Abuse Case*, 18 LAW & HUM. BEHAV. 507 (1994). On the other hand, there is evidence that strong emotional sympathies for victims also adversely affect rational decision making in verdicts. See Neal R. Feigenson, *Sympathy and Legal Judgment: A Psychological Analysis*, 65 TENN. L. REV. 1 (1997), for a review.

38. See, e.g., Victor Florian & Mario Mikulincer, *Fear of Death and the Judgment of Social Transgressions: A Multidimensional Test of Terror Management Theory*, 73 J. PERSONALITY & SOC. PSYCHOL. 369 (1997); Jeff Greenberg et al., *Terror Management Theory of Self Esteem and Cultural Worldviews: Empirical Assessments and Conceptual Refinements*, 29 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 61 (1997); Jeff Greenberg et al., *Evidence For Terror Management Theory II: The Effects of Mortality Salience on Reactions To Those Who Threaten or Bolster the Cultural World View*, 58 J. PERSONALITY AND SOC. PSYCHOL. 308 (1990); Arthur G. Miller et al., *Accounting for Evil and Cruelty: Is to Explain to Condone?*, 3 PERSONALITY & SOC. PSYCHOL. REV. 254 (1999).

shown to have an increased liking for members of their own nationality, experience greater stress to violations of cultural standards, express increased aggression against someone who criticizes or takes positions opposed to their own political views, and express greater punitiveness toward persons who transgress legal standards.³⁹

The sources of jurors' knowledge, information, and attitudes may come from pre-existing dispositions, from mass media, and from other persons in the juror's social environment through means of gossip and rumor.⁴⁰ In ordinary cases the gossip and rumor may be nugatory or absent, but in high-profile cases members of the community frequently discuss the events and make normative statements about their meaning and about the proper outcome of the trial. Judge Matsch recognized these sociological facts in reaching his conclusion in *McVeigh* that the whole citizenry of the state of Oklahoma had become victims.⁴¹ Other research on pretrial prejudice has uncovered similar normative pressures that work on the minds of jurors.⁴²

Judge Matsch's statement that jurors may not recognize their own prejudices⁴³ is consistent with psychological research on jurors and, indeed, in many other areas of human behavior.⁴⁴ The legal system, of course, must ultimately rely on prospective jurors' self-reports during voir dire in order to ascertain whether they are impartial. Nevertheless, research also shows that the voir dire process is an imperfect legal instrument. In a recent article, Judge Gregory Mize described his research on jurors in felony trials who had been asked

39. See Greenberg et al., *supra* note 38.

40. See Neil Vidmar, *Retributive Justice: Its Social Context*, in *THE JUSTICE MOTIVE IN EVERYDAY LIFE* (Michael Ross & Dale T. Miller eds., 2001).

41. *United States v. McVeigh*, 955 F. Supp. 1281 (D. Colo. 1997); *United States v. McVeigh*, 918 F. Supp. 1467 (W.D. Okla. 1996).

42. Neil Vidmar, *Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation*, 26 *LAW & HUM. BEHAV.* 73 (2002), available at <http://www.law.duke.edu/pub/vidmar/pretrialPublicity.pdf>.

43. *McVeigh*, 918 F. Supp. at 1472; see also *Irwin v. Dowd*, 366 U.S. 717, 728 (1961). "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many times admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." In *Murphy v. Florida*, 421 U.S. 794, 803 (1975), another court stated: "In a community where most veniremen will admit to a disqualifying prejudice, the reliability of the others' protestations may be drawn into question; for it is then more probable that they are part of a community deeply hostile to the accused, and more likely that they unwittingly have been influenced by it."

44. See Vidmar, *supra* note 42; Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Process*, 84 *PSYCHOL. REV.* 231 (1977).

up to eighteen questions during voir dire.⁴⁵ Subsequently, Judge Mize informally interviewed jurors who had not responded to questions he had asked during voir dire. While some of the nonresponders indicated that they did not understand the questions and others were just resentful at being called for jury duty, still others revealed biases strongly favorable to the defense or the prosecution.

Judge Mize's findings are consistent with other research on voir dire.⁴⁶ Some prospective jurors who hold biases are likely to state that they can be impartial solely because that answer is consistent with socially learned values that people should be impartial, a phenomenon that psychologists call "socially desirable" responses. The tendency to provide such answers can be enhanced by the authoritative presence of the judge. In other instances, the juror may not be self-cognizant of his or her own biases. In still others the juror may hold back information because the information sought is seen to infringe on personal privacy.⁴⁷ In short, the voir dire is an imperfect device for assessing bias in jurors, a device that can be metaphorically described as a net with holes in it.

The body of research⁴⁸ on the effects of pretrial prejudice indicate that legally improper biases can be manifested at various points

45. Gregory E. Mize, *On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter The Jury Room*, 36 CT. REV. 10 (1999).

46. See, e.g., NEIL KRESSEL & DORIT KRESSEL, *STACK AND SWAY: THE NEW SCIENCE OF JURY CONSULTING* (2002); MICHAEL SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 66-71 (1978); BRONSON, *supra* note 29; Dale W. Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503 (1965); Kerr, *supra* note 37; Kramer, *supra* note 37; Linda L. Marshall & Altera Smith, *The Effects of Demand Characteristics, Evaluation Anxiety and Expectancy on Juror Honesty During Voir Dire*, 120 J. PSYCHOL. 205 (1986); Richard Seltzer et al., *Juror Honesty During The Voir Dire*, 19 J. CRIM. JUST. 451 (1991); Neil Vidmar & Julius Melnitzer, *Juror Prejudice: An Empirical Study Of A Challenge For Cause*, 22 OSGOODE HALL L.J. 487 (1984); Irwin A. Horowitz, *Juror Selection: A Comparison of Two Methods in Several Criminal Cases*, 10 J. APPLIED SOC. PSYCHOL. 86 (1980); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court*, 30 STAN. L. REV. 491 (1978); Michael T. Nietzel & Ronald C. Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 LAW & HUM. BEHAV. 1 (1982); Gordon Bermant & John Shapard, *The Voir Dire Examination, Juror Challenges and Adversary Advocacy*, in *THE TRIAL PROCESS* 69 (Bruce Dennis Sales ed., 1981); Steven D. Penrod, *Predictors of Jury Decision Making in Criminal and Civil Cases: A Field Experiment*, 3 FORENSIC REP. 261 (1990); Moran et al., *Jury Selection in Major Controlled Substance Trials: The Need for Extended Voir Dire*, 3 FORENSIC REP. 331 (1990).

47. Mary R. Rose, *Jurors' Views of Voir Dire Questions*, 85 JUDICATURE 10, 12 (2001).

48. See Vidmar, *supra* note 42; Margaret Bull Kovera, *The Effects of General Pretrial Publicity on Juror Decisions: An Examination of Moderators and Mediating Mechanisms*, 26 LAW & HUM. BEHAV. 43 (2002); Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-analytic Review*, 23 LAW & HUM. BEHAV. 219 (1999);

in the trial process and jeopardize an impartial evaluation of the evidence:

- (a.) The biases can prejudice jurors' initial assumptions about a defendant's guilt.
- (b.) The biases can improperly influence the evaluation of evidence through selective attention and weighting of evidence consistent with pre-existing biases.
- (c.) The biases can influence predeliberation preferences of verdicts;
- (d.) The biases can influence the initial distribution of juror verdicts that lead to the final verdict.
- (e.) The biases can promote jury deliberations that exacerbate the initial biases of the jurors.
- (f.) The biases can instigate a "rotten apple" effect whereby one or more tainted jurors infect other jurors with emotional appeals during deliberation.
- (g.) In the event that the evidence of guilt is near equipoise at the end of deliberations, the biases can improperly tilt the jury toward a verdict of guilty.

C. Potential Sources of Prejudice in Trials of Alleged Terrorists

In a prior article, I outlined a general framework for analyzing the sources of prejudice in criminal and civil trials.⁴⁹ The framework is consistent with American case law, but analyzes the sources systematically into four categories or types: interest prejudice, specific prejudice, generic prejudice, and conformity prejudice. For purposes of this Article, the discussion is primarily limited to potential sources of prejudice in trials of alleged terrorists.

Interest prejudice incorporates what is sometimes called "manifest" or "obvious" prejudice. Persons with an interest in the outcome of a trial, such as a familial, social, or financial relationship to one of the litigants, are subject to being excused from jury duty, as are those who have direct knowledge of the events at issue. Jurors can be automatically excused if the court determines they have an interest in the trial outcome, or the appearance of an interest.⁵⁰

After September 11, all Americans are victims or potential victims of terrorists, not only in the sense that they are subject to physi-

Steven D. Penrod and Larry Heuer, *Pretrial Publicity: The Media, the Law and Common Sense*, 3 PSYCHOL. PUB. POL. & LAW 428 (1997).

49. Vidmar, *supra* note 42.

50. GERTNER & MIZNER, *supra* note 21.

cal harm if terrorists carry out attacks in the future, but also in the subjective sense that the terrorists' motive is to attack American culture and nationality, an inherent part of the self-identity of Americans. As noted above, threats to self-identity can evoke very strong negative emotions.⁵¹ Of course, the degree to which potential jurors have connections to victims of September 11, feel threatened by future potential terrorist attacks, or have their self-identity threatened by the hatred of terrorists will vary from location to location⁵² and individual to individual.

Specific prejudice exists when a juror holds attitudes or beliefs about specific issues in the case that prevent him or her from rendering a verdict with an impartial mind. Specific prejudice is usually generated by mass media or by community rumors and gossip. Specific prejudice may involve beliefs that are not factually correct, as well as ones that are correct but not legally relevant to the case. In the *McVeigh* case, the mass media carried articles that were factually incorrect and potentially prejudicial.⁵³ In the John Walker Lindh case, and in other instances, major authority figures, including Attorney General Ashcroft, appeared on television to announce the capture or indictment of the alleged terrorists—communications that, while usually carefully worded, convey guilt, in the context of “striking another blow against international terrorism.”⁵⁴ More will be said about the Lindh case below. The mass media, of course, also investigate cases and provide copious background details about the allegations.

Generic prejudice involves the transfer of pre-existing prejudicial attitudes, beliefs, or stereotypes about *categories* of persons, entities, or events to the trial setting in a legally inappropriate manner. As contrasted with specific prejudice, it is the perceived exogenous characteristics of trial participants that cause the juror to categorize trial participants or events as falling within a stereotyped class, such that the evidence is evaluated in a biased manner. Racial prejudice is

51. See *supra* note 37.

52. A town in the Midwest is less likely to be the subject of a terrorist attack than New York City or Washington, D.C., and the citizens might be expected to have less fear of physical harm, although the symbolic harm may be just as great.

53. Stephen Jones & Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 58 (1998).

54. See Declaration of Tony West in Support of Defendant's Motion to Dismiss, or in the Alternative, for Transfer of Venue, *United States v. Lindh*, (E.D. Va. No. 02-37-A); Declaration of Steven Penrod in Support of Defendant's Motion to Dismiss, or in the Alternative, for Change of Venue, *United States v. Lindh*, (E.D. Va. No. 02-37-A).

a clear example. A White juror holding stereotyped beliefs about African-Americans being prone to violence might be inclined to believe that an African-American charged with a crime of violence is more likely to be guilty than if he were White. A set of beliefs that homosexual males are prone to engage in sexual abuse of a child is another example. A belief that a policeman would never lie is another example. In each of these instances, attention to individual motives or the context in which contested actions may have taken place is overridden by beliefs and assumptions about general, immutable characteristics of persons who are identified as belonging to the same category: e.g., "African-Americans tend to be more violent than whites"; "homosexuals tend to be pederasts"; "policemen tend to be honest."⁵⁵

Generic prejudice is likely to be an insidious element in cases involving Muslims charged with acts of terrorism. While it is a fact that the current acts of terrorism arise out of beliefs associated with the Muslim religion, it is logically fallacious to conclude that all Muslims are terrorists or endorse terrorism. Nevertheless, some people may be inclined to believe that all Muslims are terrorists. Between September 11, 2001 and February 2002, over 1700 "hate crime" incidents were recorded against Muslim individuals or organizations,⁵⁶ suggesting that some persons are inclined to hold all Muslims responsible for the terrorism.⁵⁷ The INS required male visitors between the ages of sixteen and forty-five from the Muslim nations of Iran, Iraq, Libya, Syria, and Sudan to report to their offices by December 16, 2002 to be fingerprinted.⁵⁸ To what extent does such action create a public perception that all of these men are dangerous?

Other persons may reject this general stereotyping but still harbor strong prejudices because of the link between the Muslim religion and terrorism. Both the mass media and government officials tend to hyphenate Muslim and terrorism. Despite admonitions by President Bush not to consider all Muslims as terrorists,⁵⁹ the current public

55. See Vidmar, *supra* note 37 for additional discussion.

56. Arabic News.Com, *American-Arab Anti-discrimination Committee Meets FBI Director*, at <http://www.arabicnews.com/ansub/Daily/Day/020213/2002021341.html>

57. Current and past incidents indicating widespread anti-Muslim attitudes in the wake of September 11 can be found on the website of the American Muslim Society. See <http://www.masnet.org>.

58. O'Connor, *supra* note 3.

59. See Jeff Jacoby, *Speaking Out Against Terror*, BOSTON GLOBE, Sept. 23, 2001, at D7, for comments made by President Bush and the FBI regarding hate crimes against Muslims. See, e.g., Bob Lewis, *Muslims Seek Positive Image*, RALEIGH NEWS & OBSERVER, Apr. 6, 2003, at

concerns and fears are with “Muslim-terrorists.” Put as a syllogism, psychological reasoning for some jurors may be as follows: All terrorists are Muslims. This accused person is a Muslim. Therefore, the accused person is a terrorist. The fact that this is logically fallacious reasoning can be easily obscured in the light of official actions and pronouncements, as well as linkages in the mass media. The tendency to link a criminal defendant accused of ties to a Palestinian group with al-Qaeda is another example.⁶⁰ Sympathy or support for Palestinian groups, even those advocating violence, does not necessarily translate into terrorism in the United States. Statements of government officials and the media linked John Walker Lindh’s case with destruction of the World Trade Center and the damage to the Pentagon, even though the legal charges against him had nothing to do with September 11.⁶¹ In short, the political and public climate is such that many types of group memberships have been incorporated under the rubric of al-Qaeda-related terrorism. This sets the grounds for transferring beliefs associated with al-Qaeda to anyone belonging to the other groups.

A striking illustration of generic prejudice in the current climate is from a North Carolina trial involving a second-degree rape charge against a Pakistani native, Prince Fahad.⁶² One hundred residents from the venue in which he was to be tried provided respondents with the facts of the case. According to Fahad’s lawyer, “Once I gave them my client’s name, they said he was ‘dead, had no chance and was guilty.’”⁶³ If a Pakistani name evokes such a strong reaction to a

A5; Kareem Shora & Joseph Limer, *In An Open Society: Veils*, NAT’L L. J., Sept. 16, 2002, at A 20.

60. DEP’T OF STATE, *supra* note 4; Douglas Frantz & Chris Hedges, *A Nation Challenged: Shoe-Bomb Investigation; Faintly Connected Dots Portray al Qaeda Man*, N.Y. TIMES, Jan. 11, 2002, at A10; Irwin Speizer, *Security Heavy in Smuggling Trial*, RALEIGH NEWS & OBSERVER, May 21, 2002 P A1; Gary Wright, *Hammoud Brothers Guilty on All Counts*, CHARLOTTE OBSERVER, June 21, 2002.

61. See Declaration of Tony West in Support of Defendant’s Motion to Dismiss, or in the Alternative, for Transfer of Venue, *United States v. Lindh* (E.D. Va. No. 02-37-A).

62. Demorris Lee, *Ethnicity Issue Delays Man’s Trial*, RALEIGH NEWS & OBSERVER, April 5, 2003, at B1.

63. *Id.* The trial was scheduled for April 2003, while the war in Iraq was in progress. The judge delayed the trial until June. In a personal conversation with the present author on April 23, 2003, defense attorney, Allen Mason, reported that in interviews he would describe the facts of the case absent the name of the defendant and ask for responses. On the described facts the respondents were either neutral or felt that the defendant had a credible defense. However, when they were then told the name of the defendant, respondents reported there was no chance that he would be found innocent. Moreover, respondents were prone to categorize the defendant’s Pakistani nationality under a rubric that included Iraqi or other nationalities associated with Islam.

criminal charge totally unrelated to terrorism, consider the impact of ethnicity if the charge was related in some way to the support of terrorism.

Conformity prejudice exists when the juror perceives that there is such strong community reaction in favor of a particular trial outcome that he or she feels pressure to reach a verdict consistent with that outcome rather than an outcome based on an impartial evaluation of the trial evidence. In 1893, sociologist Emile Durkheim observed that deviant acts evoke community responses, a finding subsequently documented by many other sociologists and social psychologists.⁶⁴ Kai Erikson's summary phrasing of this research states:

The deviant act, then, creates a sense of mutuality among the people of a community by supplying a focus for group feeling. Like a war, a flood, or some other emergency, deviance makes people more alert to the interests they share in common and draws attention to those values which constitute the "collective conscience" of the community.⁶⁵

In *McVeigh*, as reported above, Judge Match concluded that the whole state of Oklahoma was united as a family to the disaster, and that the strong emotional responses fit into a pattern of normative values.⁶⁶ He went on to assert that independent of jurors' personal stake in the trial outcome, identification with a community point of view can result in the juror feeling "a sense of obligation to reach a result which will find general acceptance in the relevant audience [i.e., the community]."⁶⁷ Since September 11, political authorities and the mass media have continually stressed the unity of Americans in the face of terrorist threats, and the need to maintain that unity.⁶⁸ In short, this social psychological perspective on potential sources of trial prejudice indicates that there are many facets to consider in assessing potential sources of bias in trials involving charges of terrorism.

64. Durkheim's research and that of others is reviewed in Vidmar, *supra* note 40.

65. KAI ERIKSON, *THE WAYWARD PURITANS* 4 (1966).

66. *United States v. McVeigh*, 918 F. Supp 1467, 1471 (W.D. Okla. 1996).

67. *Id.* at 1473.

68. Ronald Brownstein, *Americans Still Unified, Poll Shows*, CHI. TRIB., Nov. 15, 2001, at 12; Sara Fritz, *Bush Reassures American With Tough Speech*, ST. PETERSBURG TIMES, Sept. 21, 2001, at 7A; Carla Marinucci, *Bush Wants "Sprit of Unity" to Propel His Economic Plan*, S.F. CHRON., Jan. 6, 2002, at A1; Ingrid Mattson, *Islam Requires Justice for All; Understanding Islam*, HARTFORD COURANT, Oct. 21, 2001, at C1; Mark Silva, *State of Union Address: Analysis*, ORLANDO SENTINEL, Jan. 30, 2002, at A1; T.J. Milling, *America Responds: Grim Toll in N.Y. Takes Drastic Leap*, HOUSTON CHRON., Sept. 21, 2001, at 1.

III. *UNITED STATES V. JOHN PHILIP WALKER LINDH*: A CASE STUDY OF PRETRIAL PREJUDICE

A. *Background*

The story of the Lindh case is well known.⁶⁹ Shortly after the American invasion of Afghanistan, the American public was shocked to learn that one of the captured Taliban fighters was a young man named John Walker Lindh. They saw Lindh on CNN being interrogated by CIA agent Johnny Mike Spann. Shortly after fighting began, Lindh disappeared with other Taliban fighters, and Spann was killed. Lindh was wounded in the subsequent fighting and recaptured. He was held for interrogation and then moved to the United States and indicted on charges of conspiracy to murder U.S. citizens; providing material support and resources to al-Qaeda (a designated terrorist organization); and for supplying services to the Taliban.⁷⁰ Widely publicized statements by public officials accompanied Lindh's indictment linking him to America's enemies and labeling him as a terrorist and traitor.⁷¹ Media coverage bestowed on him the appellation, "the American Taliban."⁷² Unlike some cases in which media coverage radically decreases, or is absent, during the indictment and trial, media coverage tended to be continuous.⁷³

John Walker Lindh was scheduled to be tried in the United States District Court, for the Eastern Division of Virginia, Alexandria Division. In addition to the general nationwide coverage of the case, which might be expected to taint public opinion, the Alexandria Division of the Eastern District of Virginia had characteristics that distinguished it from other parts of the country.⁷⁴ The Pentagon is within its boundaries, and it is in close proximity to Washington, D.C.,

69. *E.g., supra* note 5.

70. Indictment, *United States v. Lindh* (E.D. Va. No. 02-37-A).

71. See Declaration of Tony West in Support of Defendant's Motion to Dismiss, or in the Alternative, for Transfer of Venue, *United States v. Lindh* (E.D. Va. No. 02-37-A).

72. Brian Blomquist, *Feds: Lindh Killed CIA Hero With His Silence*, N.Y. POST, June 5, 2002, at 7; Richard A. Serrano, *U.S. Admits "Souvenir" Photo of Lindh Taken*, CHI. TRIB., June 2, 2002, at 13; *Terror & Trials*, N.Y. POST, June 16, 2002, at 26.

73. Declaration of Steven Penrod in Support of Defendant John Phillip Walker Lindh's Motion to Dismiss, or in the Alternative, For Change of Venue, *United States v. Lindh* (E.D. Va. No. 02-37-A.).

74. Declaration of Neil Vidmar in Support of Defendant John Phillip Walker Lindh's Motion to Dismiss, or in the Alternative, For Change of Venue, *United States v. Lindh* (E.D. Va. No. 02-37-A).

site of some of the anthrax-contaminated letters and a perceived likely target of future terrorist attacks. The Alexandria Division population has a high percentage of government workers, persons associated with private government contractors, and military personnel, many of whom may have been directly affected by the deaths that occurred at the Pentagon. Given the proximity to Washington, D.C., and the fact that many residents work in Washington, D.C. or the Pentagon, the fear of future terrorist attacks might be higher.

Additionally, CIA agent Johnny "Mike" Spann, who was the first to interrogate Mr. Lindh, in an interrogation captured on nationwide television, and who was shortly thereafter killed, was a resident of northern Virginia. Local media covered his memorial service and published articles that included strong statements against Mr. Lindh by Mr. Spann's family.⁷⁵ The attack on the Pentagon also caused serious economic damage to Virginia, as detailed in a Virginia government report.⁷⁶ Additionally, the Virginia Department of Mental Health, Mental Retardation, and Substance Abuse Services documented the serious effects of the September 11 events and the fear of future attacks on the mental health of northern Virginia citizens, findings consistent with the potential for special fears due to the proximity of the area to Washington, D.C. and the Pentagon.⁷⁷

Moreover, content analyses of newspaper coverage conducted by Professor Steven Penrod showed that in comparison to a control city, namely Minneapolis, the newspaper coverage of the case in northern Virginia was much more extensive and prejudicial than in Minneapolis.⁷⁸

B. Survey Strategy and Sample

Five venues were selected for the survey: the Alexandria Division of the Eastern District of Virginia ("Virginia"); the Eastern Division of the Northern District of Illinois (Chicago) ("Illinois"); the

75. See, e.g., Brooke A. Masters, *Lindh Pleads Not Guilty to Aiding Terrorism*, WASH. POST, Feb. 14, 2002, at B01; Jerry Seper, *Judge Sets August 26 to Start Jury Selection for Lindh Trial*, WASH. TIMES, Feb. 16, 2002, at A03.

76. Virginia's Economic Impact of the September 11, 2001 Terrorist Attack, (Nov. 1, 2001), at <http://filebox.vt.edu/chre/elps/EPI/Perspectives/finances.pdf>.

77. Virginia Terrorism-Related Mental Health Needs Assessment, (Nov. 26, 2001), at <http://www.dmhmrzas.state.va.us/Organ/CO/Offices/Commissioner/NeedsAssessmentReport>.

78. Declaration of Steven Penrod in Support of Defendant John Phillip Walker Lindh's Motion to Dismiss, or in the Alternative, For Change of Venue, *United States v. Lindh* (E.D. Va. No. 02-37-A).

Fourth Division of Minnesota (Minneapolis) (“Minnesota”); the San Francisco Division of the Northern District of California (“California”); and the Western District of Washington (Seattle) (“Washington”). The sampling strategy involved a randomly selected sample of four hundred jury-eligible respondents in Virginia and samples of two hundred respondents in each of the other four venues. Selection criteria defining jury eligibility was set according to the jury wheel standards in each venue.⁷⁹ Telephone interviews were carried out in each of the five jurisdictions between April 29, 2002 and May 2, 2002. Some respondents were dropped from the sample because the interview subsequently revealed they did not meet certain eligibility criteria. Consequently, the final working samples were as follows: Virginia, 356 respondents; Illinois, 166 respondents; Minnesota, 178 respondents; California, 172 respondents; and Washington, 181 respondents.⁸⁰

C. *The Survey*

The survey questionnaire contained forty-three questions dealing with substantive matters plus other questions bearing on the representativeness of the sample, an ultimate total of seventy-two questions. The questionnaire contained both “close-end” questions asking the juror to choose between various answers and “open-end” questions in which respondents were asked to provide reasons or explanations in their own words. Responses to open-end questions were recorded verbatim. The interviews of each respondent lasted, on average, twenty-two minutes. A synopsis of the central questions is contained in the Appendix at the end of this Article. For this Article, only selected data from the survey will be discussed.

An initial question (Q20), asked the respondents to indicate their degree of concern about terrorism in the city in which they live, as well as three other questions irrelevant to the assessment of bias, but intended to disguise temporarily the main purpose of the interview. These questions were followed by questions asking the respondents’ views of John Walker Lindh (Qs 23–25). Next, in Q26 the charges

79. In Virginia and Illinois, the jury wheel is drawn from lists of registered voters, but in the other jurisdictions the voter lists are supplemented with drivers license lists and state identification cards. The sampling strategy was designed to take these differences into account.

80. In Virginia, a minor weighting adjustment was made for some cross tabulations to account for sampling error. The adjustment was made in accordance with accepted professional standards.

against Mr. Lindh were described and respondents were asked to indicate whether they believed he was definitely guilty, probably guilty, probably not guilty, or definitely not guilty. Regardless of the answer, respondents were asked why they took that position (Q27).

In Q28 respondents were asked to assume that Mr. Lindh was put on trial before a judge and jury, and that the jury found that he was not guilty of the charges. The respondents were asked if they would consider a not guilty verdict very acceptable, acceptable, not acceptable, or very unacceptable. Then they were asked to explain in their own words why they took that position (Qs 29–30). These questions were followed by questions asking what punishment Mr. Lindh should receive if found guilty (Q31) and why (Q32). Next, the interview turned to questions about how the respondents were affected by the events of September 11 and whether they knew someone who was killed or injured in the attacks (Qs 33–41).

Then the questions turned back to Mr. Lindh, to ask respondents whether they viewed him as a terrorist (Q42), a traitor (Q43), a confused young man (Q44), a person on a religious journey (Q45), whether he was involved with the death of CIA agent Spann (Q46) and why (Q47), and if they believed there was a connection between Mr. Lindh and the September 11 attacks (Q48) and why (Q49).

The final substantive questions of the interview asked each respondent to consider that she was a prospective juror in the John Walker Lindh trial who was admonished by the judge that it was the duty of jurors to be fair and impartial. Each respondent was asked to consider carefully her feelings about Mr. Lindh and everything she knew about the case, and indicate whether she could be impartial in the trial of Mr. Lindh (Q50). Then she was asked to elaborate on why (Qs 51–52). The questionnaire was designed and structured this way in order to assess whether a respondent's tendency to provide the socially desirable answer that she could be an impartial juror, that is, say "Yes" ["I can be impartial"], was belied by prejudicial judgments and statements that the respondent made earlier in the interview. Specifically, the answers to Qs 50–52 were intended to be compared against answers to earlier questions, such as a respondent's verbatim reactions and descriptions of Mr. Lindh (Qs 23–25), belief in his guilt or innocence (Qs 26–27), and whether the respondent would be willing to accept a not guilty verdict rendered following trial by judge and jury (Qs 28–30).

D. Results of the Survey

1. Fears and Concerns Resulting from September 11

In response to Q20 more respondents in Virginia, compared to the other jurisdictions, indicated that they were concerned or very concerned about the threat of terrorism in the city in which they work or live. The percentages were as follows: Virginia (43%); California (36%); Illinois (39%); Minnesota (22%); and Washington (30%). The difference between Virginia (43%) and the averaged responses for the other jurisdictions (32%) was statistically significant.⁸¹

Question 40 asked about fear of a future terrorist attack by asking respondents to rate their feelings of threat or fear for the physical safety of their family by a future attack similar to September 11. Ratings were made on a 10-point scale, with 10 being high. The Virginia residents averaged ratings of 5.4 compared to an averaged rating of 5.0 for the combined other jurisdictions. This difference was statistically significant.

Question 36 asked respondents if they knew of someone killed or injured in the World Trade Center. Thirty-five percent of Virginia respondents said yes to this question versus 19% of the combined sample. This difference was statistically significant. (The percentages for the other jurisdictions were: California (24%); Illinois (22%); Minnesota (13%); Washington (22%).)

Question 37 asked respondents if they knew someone killed or injured in the Pentagon attack. Forty-seven percent of Virginia respondents, almost one out of every two, said that they did, compared to an average of 3% in the other jurisdictions. This difference was statistically significant. (The percentages for the other jurisdictions were: California (2%); Illinois (4%); Minnesota (2%); and Washington (6%).) Virginia respondents were also statistically significantly more likely to report that they knew someone killed or injured by the anthrax incidents (5%) versus the rest of the venues (1%). (There were no major differences between Virginia and other jurisdictions regarding the plane crash in Pennsylvania.)

81. When referring to statistical significance in this Article, I am referring to either a Chi-square test or an F test that reached a standard acceptable probability level (at least .05) such that the null hypothesis that there are no differences could be rejected. See David H. Kaye & David A. Freedman, *Reference Guide on Statistics*, in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 123-24 (2000). For purposes of this Article, all percentages have been rounded to the nearest whole number.

These data indicate that respondents in the Alexandria Division of the Eastern District of Virginia were more directly affected by the events of September 11 than respondents in the other venues surveyed.

2. Beliefs About the Charges Against Mr. Lindh

The percentage of persons with an unfavorable or very unfavorable view of Mr. Lindh (Q23) was higher in Virginia (70%) than in California (66%), Illinois (55%), Minnesota (64%) and Washington (58%). The difference between the average of these other jurisdictions' 61% versus Virginia's 70% was statistically significant. Nevertheless, in all jurisdictions the absolute number of negative perceptions was very high. A slightly higher percentage of respondents in Virginia (77%) reported that they believed Mr. Lindh was definitely or probably guilty (Q26) than the average of the other four jurisdictions (73%) but the difference was not statistically significant. (The individual percentages for the other venues were: California (75%); Illinois (74%); Minnesota (73%); and Washington (71%). Considering only "definitely guilty" responses the figures were Virginia (33%); California (28%); Illinois (33%); Minnesota (32%); and Washington (29%).)

In response to the question of whether a not guilty verdict after trial by judge and jury (Q28) was unacceptable or very unacceptable, 40% of Virginia respondents, versus 43% of the averaged other jurisdictions, endorsed this view. This difference was not statistically significant. (In comparison to Virginia, 42% of California respondents, 48% of Illinois respondents, 43% of Minnesota respondents, and 37% of Washington respondents indicated that a "not guilty" verdict was unacceptable or very unacceptable.)

Virginia respondents did not differ from the other jurisdictions in their belief of Mr. Lindh's involvement with the death of Mr. Spann (Q46) or his connection to the terrorists (Q48). However, it is noteworthy that across all jurisdictions almost one in seven persons (15%) endorsed the view that Mr. Lindh was involved with, or responsible for, the death of CIA agent Spann. And a total of slightly more than one in four persons (26%) connected Mr. Lindh with the terrorist attacks of September 11.

The verbatim answers to Q49, asking respondents to explain why they believed Mr. Lindh was or was not connected to the September 11 events, found that among those saying there was no connection,

the principal reason was that Mr. Lindh was a low-level functionary who would not be consulted by the al-Qaeda leaders. Those persons saying there was a connection (slightly over one-quarter of those surveyed in each location) reflect a tendency to globally incorporate Taliban membership and September 11. Consider some examples: "If he were part of the al-Qaeda network, then he would have to feel contempt for America as such"; "I think even the lowliest soldier in the army contributes to the overall effort of that army"; "He was involved with that organization, he would have had to be aware to a degree of what they were planning"; "He supported an organization that ultimately was responsible"; "He was working for the same terrorist groups in Afghanistan"; and "The Taliban and John Walker are all tied together because they are all tied to Osama Bin Laden."

It is not clear from the data whether the global incorporation of Lindh and September 11 was a result of the connections implied by authorities and by news stories (specific prejudice), or whether it was generated independently by respondents (a form of generic prejudice). It was likely a combination of the operation of both.

3. Self-Professed Ability To Be an Impartial Juror

Question 50 asked respondents if they could be a fair and impartial juror in the trial of Mr. Lindh. The percentages saying "Yes" in each jurisdiction were as follows: Virginia (74%); California (69%); Illinois (66%); Minnesota (68%); and Washington (80%). The combined four jurisdictions yielded an average "Yes" response of 71% compared to Virginia's 74%. The differences between Virginia and the averaged other jurisdictions were not statistically significant.⁸²

4. Interim Summary of Survey Results

The basic findings from the survey reported so far indicated that substantial numbers of persons expressed concerns about being victims of another terrorist attack and high levels of negative reactions to Mr. Lindh. Virginia residents expressed greater fears of a future attack, and many more persons in Virginia knew someone killed in the September 11 attacks. This last finding is not surprising given both the proximity of Virginia residents to the Pentagon and

82. The percentages of answers to the alternatives of impartial ("I"), not impartial ("NI"), and don't know or refused ("DK") for each jurisdiction were as follows: Virginia: I (74%), NI (22%), DK (4%); California: I (69%), NI (28%), DK (4%); Illinois: I (66%), NI (29%), DK (5%); Minnesota: I (68%), NI (28%), DK (4%); Washington: I (80%), NI (15%), DK (4%).

other occupational and demographics of the population compared to the rest of the country. But many other responses showed few differences between jurisdictions.

Approximately three out of four persons indicated they believed Mr. Lindh was guilty of the charges leveled against him. Slightly more than one in four persons believed he was connected to the September 11 attacks, and slightly more than one in six believed he was responsible for the death of CIA agent Spann.

Two other findings are crucial here. While approximately four out of every ten persons in each of the five jurisdictions indicated that they would have found a not guilty verdict following a trial by judge and jury to be unacceptable or very unacceptable, in all five jurisdictions approximately eight out of ten persons indicated they could be a fair and impartial juror if chosen for Mr. Lindh's trial. Juxtaposed against one another the results from these two questions appear contradictory. In fact, the verbatim recordings of responses to the open-end questions elaborate the contradictions.

5. Self-Assertions of Impartiality

Question 50, asking the respondents if they could be fair and impartial, was phrased to be consistent with the form of question that is asked of jurors by judges and the one that they appear to most rely on in ruling that a juror is impartial or not impartial. How reliable a gauge of impartiality is this question likely to be? Let us explore this question more thoroughly with data from Virginia respondents, paying particular attention to the verbatim responses to the open-end questions.

As described above, in response to Q50 fully 74% of Virginia respondents asserted that they could be fair and impartial in judging the guilt of John Walker Lindh. The respondents were also asked to explain why they believed that they could be impartial (Qs 51–52). An exemplar sample of their responses is reported in Table 1 (the numbers in parentheses are randomly assigned respondent identification numbers).

Table 1
Respondents' Reasons for Claiming That They
Could Be Impartial

- 1) (R#165): It must be proven with facts.
- 2) (R#116): Our system requires a jurist to be neutral/I believe in the system.
- 3) (R#506): I believe in the system and that everyone should have a fair trial.
- 4) (R#419): I am capable of listening to both sides of the evidence and making my decision based on that/I believe strongly "innocent until proven guilty."
- 5) (R#550): You never know until you hear all the facts: he still deserves a fair trial.
- 6) (R#573): I am not a subjective person. I am fair and logical and would take into consideration all of the facts presented to me and make a fair judgment.
- 7) (R#514): I feel like it's my Christian duty to be fair, and listen to all of the things set forth in the courtroom. [nothing more], To me that's the most important thing-my responsibility as a citizen and my Christian duty to be fair.
- 8) (R#920): I think I could put away all the ideals and judge him on the evidence. I have the capacity to separate my emotions from my oath as a juror.
- 9) (R#924): I am an open-minded person and a fair man. I would look at the evidence. I believe he is innocent until proven guilty.
- 10) (R#1204): I feel if I went to jury duty, I would set everything aside and listen openly. Then I could be fair because I heard from both sides. Now, without knowing enough, I couldn't say either way.
- 11) (R#1172): I would consider all the evidence presented by the court and give a fair opinion/we all have to be careful as to what we say [about?] Mr. Lindh.
- 12) (R#1326): I think, overall, I am willing to hear both sides. The press is one sided, but try to be fair. I think that everyone is biased to an extent, and I think I can put that aside.
- 13) (R#1309): I would be more than fair actually listening to all facts given and presented by the prosecution and defense. I would then make a fair and equitable judgment/I could put everything aside since I would be dealing with facts. No one would be concealing any of the actual details.

- 14) (R#1343): I am reserving judgment/I need to hear all of the facts.
-

Examination of all the respondents' answers in Table 1 shows very high similarity in their expressed reasons as to why they could be fair and impartial in judging the evidence in Mr. Lindh's trial. The explanations are all couched around variations of the need to keep an open mind. However, despite the similarity in their explanations, the respondents in the odd- versus the even-numbered rows of that table were quite different in their answers during earlier parts of the interview. Respondents in the even-numbered rows of Table 1 gave answers in other parts of their interview that were more or less consistent with their assertion of impartiality. For example, although some held unfavorable views of Mr. Lindh, in response to Q28 most of the even-number respondents in Table 1 were willing to accept a jury verdict of "not guilty" and did not use the label "traitor" during the interview.

Now turn to Table 2 and examine the interview record of respondents in the odd-numbered rows of Table 1, beginning with the first respondent (R#165).⁸³ These data demonstrate that the jurors in the odd-numbered rows gave answers that were very inconsistent with their claims of impartiality. The respondent's explanation of why he or she believed he could be fair and impartial from Table 1 is repeated and identified by italics for ease of contrast. Below is a synopsis of the answers in the earlier part of the interview.

Table 2
Interview Answers of Respondents in Odd-Number
Rows in Table 1

- 1) (R#165) *Q51 It must be proven with facts.*

Q23 Strongly unfavorable; Q24 He is a traitor; Q25 You can't trust him; Q26 Definitely guilty; Q27 He killed Americans and he should be shot; Q28 [not guilty verdict] Very unacceptable; Q29 He is guilty of the charges; Q30 I don't like traitors; Q31 Death by hanging; Q32 I want him to feel pain; Q34 I lost some friends in the tragedy; Q36 [WTC] Yes, know someone; Q37 [Pentagon] Yes,

83. In some instances the respondent had nothing more to add to a follow-up question, such as Q52, which asked if there was anything else he or she wanted to add. For brevity, Table 1 omits those "no response" items.

know someone; Q42 Definitely a terrorist; Q43 Definitely a traitor; Q46 Yes involved; Q47 He was in the same jail; Q48 Yes connection; Q49 He knew too much.

- 3) (R# 506) Q51. *I believe in the system and that everyone should have a fair trial.*

Q23 Strongly unfavorable; Q24 I call him a punk - a traitor; Q25 I think he should be executed if found guilty; Q26 Definitely guilty; Q27 They captured him with a gun in his hand where the CIA agent was killed; Q28 Very unacceptable; Q29 I think they caught him red-handed; Q31 Death; Q32 I believe in capital punishment; Q33 10; Q34 I live 4 miles from the Pentagon; a number of people killed; Members in the family were economically affected by the attack; Q36 No; Q37 No; Q42 Definitely a terrorist; Q43 Definitely a traitor; Q46 Yes involved; Q47 He was caught with the people that killed Mr. Spann; Q48 Yes connection; Q49 He worked for them - don't

- 5) (R# 550) Q51 *You never know until you hear all the facts; he still deserves a fair trial.*

Q23 Somewhat unfavorable; Q24 He was the American who was fighting for the Taliban; I consider him to be a traitor; Q25 He should not have been on the side of the Taliban; Q26 Probably guilty; Q27 He was shooting at American soldiers; Q28 Unacceptable; Q29 He was on the side of the Taliban; a not guilty verdict would not be good for the country; Q31 Life in prison; Q32 To set an example for anybody thinking of doing what he did; Q34 I could see the smoke from the Pentagon from where my family and I live; Q36 No; Q37 No; Q42 Definitely a terrorist; Q43 Definitely a traitor; Q46 No opinion; Q47 I don't know all the facts; Q48 No, no connection; Q49 He was a soldier.

- 7) (R# 514) Q51 *I feel like it's my Christian duty to be fair, and listen to all of the things set forth in the courtroom. Q52 No. To me that's the most important thing - my responsibility as a citizen and my Christian duty to be fair.*

Q23 Somewhat unfavorable; Q24 I feel that he was a traitor to our country. And now that he's been caught, he's trying to reverse his decision in order to avoid paying the price; Q25 It's because I feel he was a traitor who embraced the life of terrorism; Q26 Probably guilty; Q27 He has to be tried first but he was with them. He was training with them and didn't have a very good attitude when he was captured; Q28 Acceptable; Q29 I would have to go with the jury because that's our system, but I would be disappointed in it; Q31 I would say at least life in prison, unless he was completely rehabilitated. I wouldn't want him to be able to get back with any terrorists. I don't believe in the death penalty. He should only be

paroled, too, after a long period of time if he's [rehabilitated]; Q32 It would be the best punishment because I'm just short of wanting the death penalty for him; Q34 It was just so horrible, the surprise that it happened to our country and that our freedom was threatened. I had total empathy for them; Q36 No; Q37 Yes, know someone; Q42 Probably a terrorist; Q43 Probably a traitor; Q46 No opinion; Q47 I don't have any proof either way. I haven't seen any concrete proof of it; Q48 No, no connection; Q49 I just don't see it. I think this had been planned for a while and would have resulted regardless of him and was planned before he came on the scene.

- 9) (R# 924) Q51 *I am an open-minded man and a fair man I could I would look at the evidence. Q52 I believe he is innocent until proven guilty.*

Q23 Strongly unfavorable; Q24 He was with the guy California who went to the enemy; Q25 He was involved with the enemy; he is as bad as Bin Laden; Q26 Probably guilty; Q27 He was there; there was some evidence he was against his own country; Q28 K/Refused; Q29 I'm not sure; there would have to be a strong reason for innocence; Q30 Valid evidence; Q31 I am not that big on the death penalty; life in prison with no parole; Q32 I am not big on the death penalty, so he is locked up can and do no harm; Q34 I did know someone in the Trade Center crash who was never found; Q36 Yes, know someone; Q37 No Q42 Probably a terrorist; Q43 Definitely a traitor; Q46 No opinion; Q47 I am not too familiar with that case; Q48 Yes connection; Q49 They were training for that. He said so.

- 11) (R# 1172) Q51 *I would consider all the evidence presented by the court and give a fair opinion; Q52 We all have to be careful as to what we say [about?] Mr. Lindh.*

Q23 Strongly unfavorable; Q24 He joined with the Taliban in what they were planning and having done against the United States; Q25 I am against him for supporting the Taliban, which was against the United States; Q26 Definitely guilty; Q27 He is definitely guilty because he was in conspiracy with the Taliban against the United States to kill and do harm to our people; Q28 Unacceptable; Q29 The evidence shows that he was guilty and I do not believe that he could have that type of verdict; Q30 There's evidence that showed that he could not be found not guilty; Q31 He should receive the minimum life imprisonment or the death penalty; Q32 The seriousness of the crime by conspiring with the Taliban to fight this country; Q34 A fellow employee was killed in the Pentagon and three other employees were killed on the airplane, which crashed into the World Trade Center; Q36 Yes, know someone; Q37 Yes, know someone; Q42 Definitely a terrorist; Q43 Definitely a traitor; Q46 No opinion; Q47 I do not know that much about Mr. Spann's death; Q48 Yes connection; Q49 Due to his actions with the Taliban, I feel

he had a lot to do with the World Trade Center and the Pentagon incidents.

- 13) (R# 1309) *Q51 I would be more than fair actually listening to all facts given and presented by the prosecution and defense. I would then make a fair and equitable judgment; Q52 I could put everything else aside since I would be dealing with facts. No one would be concealing any of the actual details.*

Q23 Strongly unfavorable; Q24 He was the guy, the young American, who turned to the Taliban against the U.S. I do not believe that, at his age, he did not know what he was doing; Q25 He was fighting Americans on Afghanistan soil and was not at all patriotic; Q26 Definitely guilty; Q27 Once again, he was over 18, he is an American citizen and he was fighting against our country. The Taliban did not have him tied up and transported; he was there of his own free will on the wrong side; Q28 Very unacceptable; Q29 He is guilty of something and, to some degree or all of what he is charged with, so it would not be acceptable; Q30 No, it just would not be acceptable; Q31 Personally, I am against life imprisonment and do believe in the death penalty, but, if proven he has murdered people, death would be warranted. But, if not actual murder, life in prison without parole; Q34 Emotionally we were devastated that this would happen to all those people in the USA and then it happened at the Pentagon and Pennsylvania. We're devastated emotionally; Q36 No; Q37 No; Q42 Probably a terrorist; Q43 Probably a traitor; Q46 No opinion; Q47 All I know is, from the media, is that Mike Spann had talked but they do not know if physically he was involved; Q48 DK/No opinion; Q49 In a remote sense, there may be a connection, but we do not know how or how deep.

The examples in Table 2 clearly show that some respondents who reported that they could be fair and impartial and who provided a rationale consistent with a culturally learned American view that jurors must be fair provided answers to earlier parts of the interview that raise serious doubts that they would begin a trial with open minds. In advance of any trial evidence, their own words describe Mr. Lindh as a traitor, and definitely guilty of the acts with which he is charged. For many respondents these beliefs appear so deeply held that they state that a jury verdict of "not guilty" in a trial of Mr. Lindh would be unacceptable.

In short, these respondents' assertions of ability to be an impartial juror for Mr. Lindh's trial were highly inconsistent with other attitudes and beliefs that they revealed earlier in the interview. Once again take note of the fact that these respondents' answers to Q50

about why they could be impartial are not distinguishable from respondents who tended to mostly reserve judgment on Lindh's guilt.

In order to assess the extent to which these inconsistent attitudes and beliefs demonstrated in Table 2 were present in the sample of Virginia respondents, I assessed the interview of each person in Virginia who stated that he or she could be a fair and impartial juror in the same way that the information was compiled in Table 2. That is, the interview responses were categorized as consistent with each person's assertion of impartiality, inconsistent with the assertion, or unclear. If a respondent's answers were unclear in this categorization process the respondent was ultimately categorized as "impartial." As a reliability check on these judgments, two law student research assistants were trained, and each independently categorized the 356 interviews.⁸⁴

The results of this analysis are quite striking. Among the 356 jury-eligible respondents in the Virginia survey, recall that 262 (74%) professed impartiality. However, analyses of the full interviews lead to the conclusion that 92 of the 262 persons (35%) gave inconsistent responses similar to the respondents reported in Table 2, that is responses inconsistent with a presumption of innocence.

The implication of this conclusion is that if a jury of twelve persons were randomly chosen *only* from respondents who professed their ability to be impartial in the trial of John Walker Lindh, on average 35%, or slightly more than four of the twelve jurors, would have begun the trial holding attitudes and beliefs that are adverse or strongly adverse to the presumption of innocence.⁸⁵

A similar analysis was undertaken with the respondents from Minnesota and Washington. Recall that in Minnesota 68% said they could be fair and impartial. Yet, almost one in three (31% of professed impartiality) were highly inconsistent in their answers. In Washington 80% of respondents stated that they could be fair and impartial. Yet, when these persons' responses were assessed for consistency with that assertion slightly more than one in three (36%) expressed opinions inconsistent with a presumption of innocence. Thus, similar to Virginia, in both Minnesota and Washington slightly more than four of twelve jurors who stated they could be impartial

84. The rate of inter-rater agreement was approximately 95% between the two law students and approximately 90% between their combined responses and my own ratings.

85. The figure of 35% means that, on average, 4.2 jurors would be biased.

would actually have been biased toward guilt at the beginning of the trial.⁸⁶

6. Implications of Juror Inconsistency

A reasonable question can be posed as to whether the results from the surveys would be generalizable to a courtroom. Critics can ask whether the gravity of the courtroom atmosphere creates conditions that provoke more considered answers from prospective jurors. There is no clear answer to this criticism, but consider the following facts. The interview data from the survey respondents were obtained over an average of twenty-two minutes in which they were free of the anxiety of being questioned in a courtroom, by a judge, in front of an audience of lawyers, members of the press, and other observers in a trial that will receive national attention. Each respondent was given the opportunity to reflect about his or her own attitudes as the interview progressed. Yet, about one in three of the respondents were apparently unaware of the inconsistency between their response to the question of impartiality as a juror and their biases against Mr. Lindh, as reflected in earlier questions.

These findings about lack of awareness have been found in other high-profile trials, and are consistent with broader bodies of social psychological research on conformity, social desirability, approval motives, and self-awareness.⁸⁷ Thus, in contrast to the view that the courtroom might produce different and more accurate assessments of prejudice, there is substantial evidence to argue that the survey data produced a more accurate assessment of potential juror prejudice.

7. Postscript to the Lindh Case

These data, in more expanded form, were presented to the court in the form of an Affidavit in Support of the Defendant's Motion for a Change of Venue. The affidavit contained the present author's opinion that the voir dire process is an imperfect process, a net with holes in it. The opinion further stated that normal voir dire procedures would make it very difficult to distinguish between jurors who held attitudes consistent with a presumption of innocence and those

86. Due to time pressures involving a tight deadline, I was not able to conduct similar analyses on the Illinois and California data. However, subsequent analyses of those data yielded similar figures, namely 34% and 35% for Illinois and California, respectively.

87. See Neil Vidmar, *supra* note 42, at 92-93.

who held attitudes and beliefs inconsistent with the presumption of innocence.⁸⁸

The affidavit drew attention to the fact that despite general prejudice in all five venues tested in the survey, Virginia posed special problems because of greater media coverage of the trial in that venue and because so many potential jurors in that venue knew persons killed in the attacks, had seen the damage to Pentagon, had business interests adversely affected by the damage to the state of Virginia, and felt greater fear for their personal safety. The opinion further stated that it was highly likely that one or more jurors chosen for Mr. Lindh's trial would be persons who held biases or prejudices that would adversely effect an impartial evaluation of the evidence. The affidavit was accompanied by additional affidavits by others, documenting the actual quantity of media coverage⁸⁹ and the relative bias in the coverage in northern Virginia.⁹⁰

The trial judge dismissed the motion.⁹¹ Subsequently, Mr. Lindh pleaded guilty to some of the charges against him.⁹² There was never an opportunity to compare the survey data against voir dire questioning.

88. Research findings suggest that judge-conducted voir dire is less likely to produce full disclosure in jurors than lawyer-conducted voir dire. See Susan E. Jones, *Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131 (1987). Other research bearing on this issue is as follows: BRONSON, *supra* note 29; Peter David Blanck, *The Appearance of Justice: Judge's Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985); Craig Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121 (1984); Craig Haney, *Examining Death Qualification: Further Analysis of the Process Effect*, 8 LAW & HUM. BEHAV. 133 (1984); Nietzel & Dillehay, *supra* note 46; Michael T. Nietzel et al., *Effects of Voir Dire Variations in Capital Trials: A Replication and Extension*, 5 BEHAV. SCI. & L. 467 (1987); David Suggs & Bruce D. Sales, *Juror Self-disclosure in the Voir Dire: A Social Science Analysis*, 56 IND. L.J. 245 (1981).

89. Declaration of Tony West in Support of Defendant's Motion to Dismiss, or, in the Alternative, For Transfer of Venue, United States v. Lindh (E.D. Va. No. 02-37-A).

90. Declaration of Steven Penrod in Support of Defendant John Phillip Walker Lindh's Motion to Dismiss, or in the Alternative, For Change of Venue, United States v. Lindh (E.D. Va. No. 02-37-A).

91. Memorandum of Points and Authorities in Support of Motion to Dismiss, or, in the Alternative, For Transfer of Venue, United States v. John Phillip Walker Lindh (E.D. Va. No. 02-37-A).

92. *Lindh Pleads Guilty to Fighting With Taliban*, WASH. POST, July 16, 2002, at C14; Tom Jackman, *In Deal, Lindh Pleads Guilty to Aiding Taliban*, WASH. POST, July 16, 2002, at A01.

III. THE IMPLICATIONS FOR FUTURE TRIALS INVOLVING CHARGES RELATED TO TERRORISM

The Lindh case had unique elements. He was the first American to face trial for terrorism. The vivid footage of his capture and initial interrogation during the initial fighting in Afghanistan was televised over-and-over, shocking the nation. He was scheduled for trial in a community that contained many members who had direct links to victims of September 11, who had seen the destruction of the Pentagon or the World Trade Center with their own eyes, who were perhaps more vulnerable to future terrorist activity than persons in other parts of the country, and who also suffered greater economic losses as a result of September 11. Moreover, Mr. Lindh's trial was scheduled to overlap with the first anniversary of September 11, an event that would evoke strong emotions among jurors, even if they were sequestered.

News stories about other persons accused of terrorist-related activities have lesser media coverage and much less dramatic visual images than occurred in the Lindh case. Helping to finance terrorism through international money transfers, or forging passports, especially if they have no direct link to specific terrorist activity, is not the same as being a soldier fighting on behalf of an enemy army.

Nevertheless, charges of engaging in or abetting acts of terrorism against the United States are likely to evoke in many members of the American population feelings of threat, perhaps physically, and certainly in terms of values associated with American life. Changing venue to another location may diminish the impact of specific publicity, but it is likely that interest prejudice, generic prejudice, and conformity prejudice will be present to some degree in the alternative venue. When accused persons are ethnically of Arab descent and adhere to the Muslim, religion generic prejudices about the links between these factors and terrorism are likely to be foremost in prospective jurors' minds, even among those who do not harbor general hostility toward Arabs or Muslims. It is very plausible to hypothesize that these beliefs are present in all communities since all Americans are potential victims, though, as noted before, they may vary in degree between communities.

As noted earlier in this Article, many judges are resistant to consider changes of venue as a remedy.⁹³ Following *U.S. v. Patton*⁹⁴ and other cases,⁹⁵ judges appear to have great faith in the assurances of jurors during voir dire that they can be fair and impartial, even when questioning of prospective jurors is perfunctory and/or en masse, rather than individually.⁹⁶ This belief in jurors' superficial self-assessments persists, despite the fact that systematic research indicates that jurors feel pressure to give socially desirable answers, and often do not have self-awareness of their own prejudices.⁹⁷ Judges also express the belief that, even if the voir dire is an imperfect procedural screening device, the process of deliberation will correct any biases harbored by individuals. This reasoning is arguably justified when prejudices are idiosyncratic and randomly distributed in jury members. However, it ignores the fact that in trials of alleged terrorists many members of the jury might harbor these prejudices, and they point in one direction, namely probable guilt. Studies of deliberating groups suggest that when group members hold similar biases, the process of deliberation often exacerbates rather than cancels or moderates biases.⁹⁸

In contrast to these widely held judicial views, the survey data for the Lindh case demonstrate rather dramatically that prospective jurors' simple affirmations of their ability to be fair and impartial should not be taken at face value. There are no clear and easy answers to the problems raised in this Article. But if a fair trial consistent with American standards of justice is to be attained for people accused of terrorism, more than routine remedial legal procedures are needed.

93. Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 FLA. L. REV. 425 (1999); Michael Jacob Whelan, *What's Happened to Due Process Among the States? Pretrial Publicity and Motions for Change of Venue in Criminal Proceedings*, 17 AM. J. CRIM. L. 175 (1990).

94. *Patton v. Yount*, 467 U.S. 1025, 1040 (1984).

95. E.g., *Mu'Min v. Virginia*, 500 U.S. 415 (1991).

96. See Hans & Jehle, *supra* note 29.

97. See Vidmar, *supra* note 42, at 91.

98. E.g., Noah E. Friedkin, *Choice Shift and Group Polarization*, 64 AM. SOC. REV. 856 (1999); D. G. Myers & G. D. Bishop, *Discussion Effects on Racial Attitudes*, 169 SCI. 778 (1970); David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 PSYCHOL. BULL. 602 (1976); Neil Vidmar, *Group Composition and the Risky Shift*, 6 J. EXPERIMENTAL SOC. PSYCHOL. 153 (1970).

APPENDIX: ABBREVIATED VERSION OF QUESTIONNAIRE IN LINDH SURVEY

(Questions 1–18 were screening questions)

Before I begin the main questions let me say that we are seeking opinions and reactions to events. There are no right or wrong answers. If you do not have an opinion on something you should feel free to simply say that you have no opinion on the matter.

To begin I am going to read you a list of issues. For each issue please tell me if you are very concerned; concerned; somewhat concerned; not very concerned; or not at all concerned about that issue.

SCALE: 1. Very concerned 2. Concerned 3. Somewhat concerned
4. Not very concerned 5. Not at all concerned 6. (Don't Know)

(RANDOMIZE Q19–Q22)

- 19. The economy?
- 20. The threat of terrorism in the city in which you work or live?
- 21. The costs of medical insurance?
- 22. The environment?

Now, I want to turn to some names that have been in the national news.

- 23. Do you have a strongly favorable, somewhat favorable, somewhat unfavorable or strongly unfavorable opinion of John Walker Lindh (lind)?

strongly favorable,
somewhat favorable,
somewhat unfavorable
strongly unfavorable?

(Can't Rate)

(Never Heard)

- 24. What can you tell me about John Walker Lindh? [Verbatim]

- 25. Why do you have:

if Q23=1 or 2, insert "a Favorable"

if Q23=3 or 4, insert "an Unfavorable"

if Q23=5 or 6, insert "No"

opinion of John Walker Lindh? [Verbatim]

- 26. As you may know, John Walker Lindh is charged by the U.S. Government with a number of crimes that include: conspiracy to murder U.S. citizens; providing material support and re-

sources to al Qaeda (all KIE duh), a designated terrorist organization; and supplying services to the Taliban.

Based on what you have seen, read or heard about this case, do you think John Walker Lindh is (READ RESPONSES):

Definitely guilty,

Probably guilty,

Probably not guilty ,or

Definitely not guilty?

[DK/Refused.] Do not read

27. Why is that? [Verbatim]

28. Consider this question. Assume that in the near future Mr. Lindh is put on trial before a judge and jury for the crimes that the government alleges that he has committed, and that the jury finds that Mr. Lindh is not guilty of the charges.

Would you personally find a not guilty verdict [READ RESPONSES, Randomly reverse order of alternatives, from 1-4 or 4-1]

Very acceptable,

Acceptable,

Unacceptable,

Very unacceptable?

[DK/Refuse] Do not read

29. Why is that? [Verbatim]

30. Any other reasons [Verbatim]

31. If Mr. Lindh is found guilty of the crimes with which he is charged, what do you think his punishment should be? [Verbatim]

32. Why do you suggest that particular punishment? [Verbatim]

I need to ask you some questions about the events of September 11 last year.

33. To what extent were you and those close to you affected by the events of September 11th? Please answer on a scale from 1 to 10, with 1 being Not at all affected, and 10 being very much affected. The mid points of the 10-point scale would indicate that you feel moderately affected. Where do you fall on this 10-point scale?

(Not at all affected) 1 2 3 4 5 6 7 8 9 10 (Very affected).

11. Don't Know

(IF Q33 = 1-5 OR 11, SKIP TO Q36)

34. How were you or those close to you affected? [Verbatim]

35. How has this impacted your life? [Verbatim]

(RESUME ASKING EVERYONE)

Thinking specifically about the events related to September 11. . .

36. Do you, or does someone close to you, know anyone who was killed or injured at the World Trade Center?

Yes, Know Someone

No

[DK/Refuse] Do not read

37. Do you, or does someone close to you, know anyone who was killed or injured at the Pentagon?

Yes, Know Someone

No

[DK/Refuse] Do not read

38. Do you, or does someone close to you, know anyone who was killed or injured in the hijacked plane that crashed in Pennsylvania?

Yes, Know Someone

No

[DK/Refuse] Do not read

39. Do you, or does someone close to you, know anyone who was killed or injured in the anthrax attack on the postal system?

Yes, Know Someone

No

[DK/Refuse] Do not read

40. To what extent do you or those close to you feel threatened or fear for the physical safety of your family or friends by the possibility of another event similar to the September 11 events? Please answer on a scale from 1 to 10, with 1 being Not at all threatened, and 10 Very much threatened. Where do you fall on this 10-point scale?

(Not at all threatened) 1 2 3 4 5 6 7 8 9 10 (Very threatened).

11. Don't Know

41. To what degree do you have feelings that you yourself are a victim of the events that occurred in September of last year? Please answer on a 10-point scale with 1 indicating that you don't feel at all like a victim, 10 being that you feel very strongly like a victim. Where do you fall on this ten-point scale?

("Not at all a victim") 1 2 3 4 5 6 7 8 9 10 (very strongly a victim)

11. (Don't Know)

Now I want to return for a moment to John Walker Lindh.

Please tell me if you believe the following statements said about John Walker Lindh are definitely true, probably true, probably false or definitely false.

SCALE:1. Definitely True 2. Probably True 3. Probably False
4. Definitely False 5. (Don't know)

(RANDOMIZE Q42-Q45)

42. He is a terrorist?

43. He is a traitor?

44. He is a confused young man?

45. He was on a religious journey?

46. Some people have claimed that John Walker Lindh was involved in some way with, or is somehow responsible for, the death of CIA agent Johnny Mike Spann who was killed in Afghanistan. Do you think he was involved with the death of Mr. Spann or do you have no opinion on this matter?

Yes, involved

No, not involved

No opinion

47. Why is that? [Verbatim]

48. Some people say that there is a connection between John Walker Lindh's actions in Afghanistan and the attacks in New York and Washington last September 11, but other people say that there is no connection to those events. Do you think there is a connection or that there is **no** connection?

Yes, connection

No, no connection

Don't Know/No Opinion

49. Why is that? [Verbatim]

50. *I just want to hold your attention for another minute. You have been very patient.*

I have asked you as lot of questions about the John Walker Lindh case. Here is the most important question. Please visualize the following situation. Please think about it carefully before you give your answer.

Assume that you are called for jury duty in the John Walker Lindh trial. In the courtroom the judge informs you that Mr. Lindh is charged with: conspiracy to murder U.S. citizens; providing material support and resources to al-Qaeda, a designated terrorist organization; and supplying services to the Taliban.

The judge states that the burden of proof is on the prosecution to prove Lindh's guilt. The judge also says that it is very important

that a juror be able set aside any prejudices and be fair and impartial in deciding his guilt or innocence.

Considering everything—your own feelings, any discussions you have had with other people, and your conscience—do you believe that you could be a fair and impartial juror in the trial of John Walker Lindh, as the law requires?

Yes, could be fair and impartial

No, could not be fair and impartial

Don't Know/Refuse to answer

51. What is your reason for saying that? [Verbatim]

Are there any other reasons for saying that? [Verbatim]

Those are all the questions that I have for you but before we stop I need to get some general personal information from you to assist us in making sure that we have a representative sample. . . .